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APR 26 2006

OFFICE OF PETITIONS

In re Application of	:	
Bland, et al.	:	
Application No.: 10/805,815	:	ON PETITION
Filed: March 22, 2004	:	
Attorney Docket No.: 25096B	:	
For: METHOD FOR RECYCLING BUILDING	:	
MATERIALS	:	

This is a decision on the petition under 37 CFR 1.137(a), filed April 6, 2006, to revive the above-identified application. The petition will be treated under 37 CFR 1.181, as well.

The petition under 37 CFR 1.181 is **dismissed**.

The petition under 37 CFR 1.137(a) is **dismissed**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to submit the issue fee and publication fee in response to the Notice of Allowance and Fee(s) Due, mailed October 18, 2005, which set a period for reply of three (3) months. This application became abandoned on January 19, 2006. A Notice of Abandonment was mailed on March 22, 2006.

Petitioners assert that the issue fee and publication fees were timely submitted via facsimile on January 18, 2006, but the Office did not receive them. Petitioners state that an unnamed docket clerk mistakenly sent the document to the previous facsimile number for acceptance of issue fees. Therefore, the fees were not received by the Office. It had been assumed that the documents were successfully transmitted until receipt of the Notice of Abandonment, dated March 22, 2006.

Petitioners are advised that when the Office has no record of receiving a facsimile, a petitioner must prove that it was indeed filed. 37 CFR 1.8(b) requires that a petition be filed requesting that the correspondence be accorded a filing date as of the date the correspondence is shown to have been transmitted to and received in the Office.

The showing must include a copy of the previously transmitted correspondence with a certificate of transmission affixed thereto and a statement which attests on a personal knowledge basis to the previous timely transmission. If the correspondence was sent by facsimile, a copy of the sending unit's report confirming transmission may be used to support this statement. Furthermore, under 37 CFR 1.8(c), the Office may require additional evidence to determine if the correspondence was timely filed.

As a preliminary matter, petitioners are informed that it is permissible to transmit the issue fee and publication fee to Publications Division directly at (703) 746-4000, which is the facsimile number used on January 18, 2006. MPEP 502.01 I B(3)

The showing of record does not merit withdrawing the holding of abandonment because the transmission was not completed. The sending unit's report contains an error message that states that there was no answer at the facsimile number and the transmission failed. The sending unit's report confirms that transmission was not timely completed. Thus, Rule 1.8 cannot be relied upon to obtain withdrawal of the holding of abandonment. The petition under 37 CFR 1.181 is dismissed.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c). The instant petition lacks item (3).

Regarding (3) above, petitioner has not shown to the satisfaction of the Commissioner that the entire delay from the due date of the reply to the filing of a grantable petition was unavoidable.

The Commissioner may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable". 35 U.S.C. § 133. Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word unavoidable ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and

reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

Petitioners' evidence shows that it was **not** unforeseeable that the January 18, 2006 transmission failed. The sending unit's report shows that the two page facsimile transmitted to 703 746-4000 was not successful. Therefore, on January 18, 2006, only a few minutes after the attempted transmission, petitioners were on notice that it was not successful. A reasonable and prudent person would have reviewed the transmission report to verify successful transmission and when the transmission failure was discovered, would have taken other steps to submit the fees timely.

The petition under 37 CFR 1.137(a) is dismissed.

ALTERNATE VENUE

Petitioners are encouraged to file a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioners intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

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By FAX: (571) 273-8300 - ATTN: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3230.



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